Supreme Court, U.S.
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No. 02-1790

IN THE

Supreme Court of the United States

ISHMAEL NWANGWA,

Petitioner,

v.

FEDERAL EXPRESS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

COLBY S. MORGAN
Attorney for Respondent
3620 Hacks Cross Road
Building B, Third Floor
Memphis, TN 38125
(901) 434-8545

182154

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

The parent company of Respondent Federal Express Corporation is FedEx Corporation. Respondent is a wholly-owned subsidiary of FedEx Corporation. FedEx Corporation is publicly traded.

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STATEMENT OF THE CASE

Petitioner's employment as an operations manager for Respondent was marked by ongoing performance deficiencies that ultimately led to his termination pursuant to the Performance Improvement Policy. This policy applied to all employees, including Petitioner. The policy prescribed progressive discipline for continuing performance deficiencies. A written performance reminder was the next step after counseling when an employee continued to exhibit performance problems. If an employee repeatedly failed to improve his performance, termination normally resulted with the issuance of three performance reminders within a twelve-month period. This is precisely what happened to Petitioner.

In April 1998, Petitioner transmitted a personal email intended for a female employee, but inadvertently "broadcast" the email to other employees. The email said that Petitioner "loved" the employee, and he admitted he had pictures of her in his office. His manager issued Petitioner a counseling memorandum for this violation of the Acceptable Conduct Policy. Petitioner conceded a more serious warning letter could have been issued to him.

In the ensuing months, Respondent issued seven more counseling memoranda to Petitioner in an attempt to correct various performance deficiencies. Specifically, Respondent counseled Petitioner for: (1) failing to timely submit his workgroup time cards; (2) obtaining poor leadership scores from his workgroup on his Survey Feedback Action evaluation; (3) leaving packages on rollers at the station; (4) failing to timely enter data for his workgroup into the computer; (5) failing to properly communicate with his employees; (6) failing to timely enter reports on workplace injuries into the computer system; and (7) failing to disclose a personal traffic ticket.

Petitioner's performance did not improve. On January 14, 1999, Respondent issued Petitioner his first performance reminder under the Performance Improvement Policy for failure to timely report two workplace injuries according to policy. Petitioner did not appeal the reminder through Respondent's internal grievance process, the Guaranteed Fair Treatment Procedure ("GFTP"). On February 11, 1999, Respondent issued Petitioner another counseling memorandum, this time for failing to timely conduct road tests for his employees. Petitioner admits that he had no concerns about this counseling memorandum.

Respondent issued Petitioner a second performance reminder on April 15, 1999 for his failure to plan and organize his employees' route assignments. More specifically, Petitioner failed to take proper steps to insure he had sufficient couriers running all the assigned routes of his workgroup, sometimes leaving up to seven vacant routes (40% of workgroup). This detrimentally impacted station staffing, and the ability to move freight on a timely basis in Respondent's time-sensitive system.

On April 19, 1999, Petitioner prepared a written action plan committing to improve his performance as a manager. He admitted in the plan that "[o]bviously, there is room for improvement." He supplemented the action plan on April 26, 1999, pledging his "commitment to work this plan" and "get organized more." Nevertheless, he filed a grievance regarding his second performance reminder. The discipline was upheld at Step 1, and Petitioner voluntarily chose not to pursue Steps 2 and 3 of the GFTP.

Respondent issued Petitioner another counseling memorandum on June 15, 1999 regarding packages left at its Northbrook, Illinois facility. On July 9, 1999, another employee

complained that Petitioner had attempted to arrange the employee's marriage to one of Petitioner's daughters in exchange for money. Petitioner was suspended with pay pending investigation of this bizarre circumstance. Respondent issued Petitioner a discussion memorandum regarding this incident on July 13, 1999.

Yet Petitioner's performance deficiencies persisted. On September 16, 1999, Respondent issued Petitioner another counseling memorandum regarding more packages left at the Northbrook facility. About this time, one of Petitioner's employees failed to report to work causing his route to remain uncovered, and resulting in several missed customer pickups. Petitioner first blamed the dispatcher, but finally acknowledged his ultimate responsibility as manager. On September 20, 1999, Respondent issued Petitioner a performance reminder for this incident. As a result of this third performance reminder within a twelve-month period, Petitioner's employment was terminated according to policy. He appealed his termination through the GFTP, but the termination was upheld at each of the three steps.

Petitioner admitted that his manager had counseled him many times about planning and organization prior to the events leading to his termination. He conceded that he had made mistakes as a manager. Conversely, Petitioner proffered no probative evidence of retaliation, race, gender, or age discrimination. As to race discrimination, he admitted that all the alleged isolated incidents supporting this claim were contained in a memorandum attached to his original complaint. He further admitted he prepared the memorandum off the top of his head, without referring to any notes, over four months after his termination. He admitted he did not raise most of the issues during his employment. As to the

others, he could not recall any details that would explain how he brought them to the attention of management. In the documentation supporting the GFTP grievance of his termination, Petitioner did not discuss any of these incidents. He did not complain about them in his internal EEO complaint form. Most importantly, he did not offer any evidence connecting the alleged incidents to the facts surrounding his progressive discipline and final termination. Nor did he identify any similarly situated comparators.

REASONS FOR DENYING THE PETITION

THE COURT OF APPEALS CORRECTLY DETERMINED THAT PETITIONER DID NOT PRESENT EVIDENCE OF RETALIATION OR UNLAWFUL DISCRIMINATION

The Court of Appeals for the Seventh Circuit correctly concluded that Petitioner did not present direct evidence of discrimination based on race, gender or age, and therefore was required to proceed under the indirect evidence/shifting burdens method. *Grayson v. O'Neill*, 308 F.3d 808 (7th Cir. 2002) (race claim); *Mateu-Anderegg v. Sch. Dist. of Whitefish Bay*, 304 F.3d 618 (7th Cir. 2002) (gender claim); *Gordon v. United Airlines*, Inc., 246 F.3d 878 (7th Cir. 2001) (race and age claims). Petitioner failed to provide evidence supporting his *prima facie* case under the indirect proof method. He conceded the facts supporting two performance reminders, and offered no evidence to rebut the facts underlying the third performance reminder and termination. Thus, he was not meeting Respondent's legitimate business expectations.

As to his retaliation claim, the Court of Appeals correctly found that Petitioner did not make a discernible argument regarding why he should prevail. He provided no causal connection between his alleged protected conduct and adverse employment action. Moreover, he did not show that similarly situated employees were treated more favorably.

Petitioner relies in his petition exclusively on *Lujan, Secretary of the Interior, et al. v. National Wildlife Federation, et al.*, 497 U.S. 871 (1990). However, this reliance is misplaced. The Supreme Court noted in *Lujan* that ". . . the purpose of Rule 56 is to enable a party who believes there is no genuine dispute as to a specific fact essential to the other side's case to demand at least one sworn averment of that fact before the lengthy process of litigation continues." *Id.* at 888-889. The Court determined that the non-moving party's averments did not satisfy Rule 56 because of their omission of material facts:

> It will not do to "presume" the missing facts because without them the affidavits would not establish the injury that they generally allege. That converts the operation of Rule 56 to a circular promenade: plaintiff's complaint makes general allegation of injury; defendant contests through Rule 56 existence of specific facts to support injury; plaintiff responds with affidavit containing general allegation of injury, which must be deemed to constitute averment of requisite specific facts since otherwise allegation of injury would be unsupported (which is precisely what the defendant claims it is).

Id. at 889.

Petitioner makes the same mistake that the non-moving party made in *Lujan*. His sworn "averments" are so devoid of factual specificity, so lacking in probative value, and so unconnected to the alleged adverse employment action, as to be of no consequence in the disposition of the case. For practical purposes they do nothing more than recite the contents of his pleading. Petitioner's averments never attempt to contradict the operative facts that chronicle the reasons for his termination as developed in the proof. Petitioner averred nothing to contradict the legitimate business reasons for the issuance of the three performance reminders that necessitated his termination according to company policy. As such, Petitioner's averments perpetrate the red herring fallacy by missing the central point — that Defendant's actions in disciplining and terminating Petitioner were lawful and non-discriminatory, and Petitioner has presented no countervailing evidence of this fact.

CONCLUSION

For these reasons, the Petition should be denied.

Respectfully submitted,

COLBY S. MORGAN
Attorney for Respondent
3620 Hacks Cross Road
Building B, Third Floor
Memphis, TN 38125
(901) 434-8545